No. 09-753

In the Supreme Court of the United States

ROBERT MCGOWAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, after reversing the district court's grant of petitioner's motion for a judgment of acquittal, the court of appeals exceeded its supervisory authority when it reassigned the case to another district court judge for sentencing on remand

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OPINION BELOW

The opinion of the court of appeals (Pet App 1-2) is not published in the *Federal Reporter* but is reprinted in 338 Fed Appx 662

JURISDICTION

The judgment of the court of appeals was entered on July 17, 2009 A petition for rehearing was denied on August 25, 2009 (Pet App 16) On November 19, 2009, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including December 23, 2009, and the petition was filed on that date The jurisdiction of this Court is invoked under 28 U S C 1254(1)

STATEMENT

Following a jury trial in the United States District Court for the Central District of California petitioner was convicted of two counts of deprivation of rights under color of law, in violation of 18 U S C 242 (Counts 2 and 3), and one count of conspiracy to obstruct justice, in violation of 18 U S C 371 (Count 1) The district court granted petitioner s motion for a judgment of acquittal on all counts The government appealed, challenging the district court's order as to Counts 2 and 3 Gov't C A Br 2 4 The court of appeals reversed and directed that the case be assigned to a different district court judge for sentencing Pet App 1-2

1 On May 9, 2002, several inmates of the California Institute for Men at Chino (Chino) were transferred to Chino's administrative segregation unit Most of the inmates were being transferred because of their suspected participation in an assault on a correctional officer earlier that day Petitioner, then a correctional officer at Chino, and other officers met the transport van upon arrival at the facility Petitioner pulled inmates Carlos Villa and Joseph Waller out of the van, threw them onto the ground, repeatedly kicked and punched them, and smashed their heads against the wall or stair rails Both inmates were shackled in handcuffs, waist and leg chains during the attack And both inmates suffered multiple cuts and abrasions to their faces Gov't C A Br 4 9

A federal grand jury returned a superseding indictment charging petitioner with two counts of deprivation of rights under color of law, in violation of 18 U S C 242 Specifically, petitioner was charged with depriving inmate Villa of his right "not to be deprived of liberty without due process of law, including the right not to

have cruel and unusual punishment inflicted upon him" (Count 2), and with depriving inmate Waller of the same (Count 3) Gov't C A E R 720-721 Petitioner and two co defendants were also charged with conspiracy to obstruct justice in violation of 18 U S C 371 (Count 1) Gov't C A E R 715-719

Petitioner moved for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(c) [1] With respect to Count 2, petitioner argued that inmate Villa described his attacker as having certain characteristics that petitioner did not (*e g*, describing his attacker as a Mexican-American) On Count 3, petitioner claimed that inmate Waller was not credible because he had initially denied that any assault occurred In response, the government argued that there was ample evidence to support the jury verdict inmate Waller identified petitioner as one of his attackers, inmate Villa was assaulted by two officers (only one of whom he thought was Mexican-American), one of the other officers saw petitioner grab inmate Villa and petitioner admitted that he physically removed the first three or four inmates from the van—inmate Villa was second and Waller was third Gov t C A Br 13 14

At the hearing on petitioner's motion, the district court focused primarily on the conspiracy to obstruct justice charge Pet App 6-12 When the judge turned to Counts 2 and 3, he did not question whether the attacks occurred or whether petitioner was the attacker—the grounds for acquittal raised by petitioner Rather, the court concluded that the attacks did not

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[1] Petitioner and his co-defendants also moved for a judgment of acquittal on Count 1 The district court granted that motion and the government did not appeal that ruling Gov t C A Br 3-4 Accordingly the discussion that follows focuses on Counts 2 and 3

amount to cruel and unusual punishment as charged because they were 'at best * * * a simple state assault and battery and should have been prosecuted by the state court as an assault and battery." *Id.* at 13. The judge permitted only a brief response from the government, and interrupted on several occasions to state that because inmate Villa "had a laceration on the chin and that's all," it was not "cruel and unusual punishment,' and to reiterate that it was "a simple assault and battery." *Id.* at 14. The court then granted petitioner's motion for acquittal on both counts, finding that "at least as the 13th juror, it was at best an assault and battery, which should have been prosecuted by the state court and can, I assume, still be prosecuted by the state court, by the State District Attorney * * * if they're interested in what the situation is." *Id.* at 14-15.

2. The government appealed. In an unpublished opinion, the court of appeals reversed and remanded for sentencing on Counts 2 and 3. Pet. App. 1-2. The court observed that "[i]n granting the motion to acquit, the district judge noted no problems with the identity of the attackers or with the evidence," but rather relied on his view that "it was at best an assault and battery, which should have been prosecuted by the state court.' *Id.* at 2. But, the court explained, "the choice of whether and how to charge a crime belongs to the executive, not the judiciary." *Ibid.* Under the proper standard, "[v]iewing the evidence in the light most favorable to the prosecution," the court held that petitioner 'used force against two inmates for the sole purpose of causing them harm" and that "[w]hen prison officials[, like petitioner,] maliciously and sadistically use force to cause harm,' they "always violate[]" "contemporary standards

of decency" *Ibid.* (quoting *Hudson* v. *McMillian*, 503 U.S. 1, 9 (1992)).

After reversing the district court's grant of petitioner's motion for a judgment of acquittal, the court remanded and directed that the case be assigned to a different district judge for sentencing. Pet. App. 2. Relying on prior Ninth Circuit precedent, the court concluded that "[t]he district judge may have difficulty putting his previously expressed views aside, and remanding to a different district judge for sentencing would entail little duplication of labor." *Ibid.* (citing, *e.g.*, *United States* v. *Murillo*, 548 F.3d 1256, 1257 (9th Cir. 2008), and *Rhoades* v. *Avon Prods., Inc.*, 504 F.3d 1151, 1165-1166 (9th Cir. 2007)).

ARGUMENT

Petitioner contends (Pet. 5) that the court of appeals' decision to reassign his case to a different district judge for sentencing "departs from the accepted and usual course of judicial proceedings * * * and * * * is in conflict with decisions [of this Court] or other [c]ourts of [a]ppeals." The court of appeals' unpublished, interlocutory decision is a fact-bound application of well-established principles, and does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. This case arises in an interlocutory posture and petitioner has made no showing of a need for immediate review. The court of appeals reversed an order granting petitioner's post-trial motion for a judgment of acquittal and remanded for sentencing. That sentencing has not yet occurred. See Pet. 5. Petitioner has not suggested, much less established, that assignment of his case to a different district judge for sentencing has caused him any immediate or irreparable harm. Following the dis-

trict court's final disposition of the case, petitioner will be able to raise his current claim, together with any other claims that may arise as a result of the additional proceedings on remand in a single petition for a writ of certiorari. See *Major League Baseball Players Ass'n* v *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (stating that this Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" the most recent judgment). The interlocutory posture of this case "alone furnish[s] sufficient ground for the denial of" the petition here. *Hamilton Brown Shoe Co.* v *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916), see *VMI* v *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari).

2. In any event, the court of appeals' decision was well within its supervisory powers and does not conflict with any decision of this Court or any other court of appeals.

a. Contrary to petitioner's suggestion (Pet. 6-9), the court of appeals' decision does not conflict with *Liteky* v *United States*, 510 U.S. 540 (1994).

Liteky involved 28 U.S.C. 455(a), which provides that a federal judge shall "disqualify himself in any proceeding in which his impartiality might reasonably be questioned," and presented the question whether recusal under that provision was subject to the "'extrajudicial source' doctrine." 510 U.S. at 541. This Court answered in the affirmative explaining, however, that the 'doctrine' was more of a *'factor'* suggesting that recusal is rarely appropriate when based on a judge's conduct during judicial proceedings. *Id.* at 554-555. As the Court observed, recusal *"may"* be appropriate if a judge's remarks during such proceedings "derive[] from an extra

judicial source,' and 'will' be warranted if they 'reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.'" *Id.* at 555.

As petitioner acknowledges (Pet. 9), however, the Court did not decide the standard to be applied before a court of appeals reassigns a case to a different judge on remand. The Court explained that a "[f]ederal appellate courts' ability to assign a case to a different judge on remand rests not on the recusal statutes alone [such as 28 U.S.C. 455], but on the appellate courts' statutory power to require such further proceedings to be had as may be just under the circumstances.'" *Liteky*, 510 U.S. at 554 (quoting 28 U.S.C. 2106). The Court noted that such cases "may permit a different standard, and there may be pragmatic reasons for a different standard," but found the proper inquiry in those distinct circumstances "irrelevant to the question before us." *Ibid.* Accordingly, the court of appeals' decision does not conflict with *Liteky*.

b. Petitioner's assertion (Pet. 9-17) that the court of appeals crafted and applied a new standard for reassignment upon remand that differs from the standard adopted by other courts of appeals, as well as by the Ninth Circuit itself, is equally without merit.

As petitioner concedes (Pet. 13), "[t]he federal appellate courts have broad discretion to fashion remedies upon remand, including reassignment to a different district court judge, pursuant to 28 U.S.C. § 2106." See 28 U.S.C. 2106 (providing that appellate courts may "remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances"). In the absence of actual bias, the courts of appeals generally ask (1) "whether the original judge

would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected,' (2) "whether reassignment is advisable to preserve the appearance of justice," and (3) 'whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness." See *United States* v *Robin*, 553 F 2d 8, 10 (2d Cir 1977) (cited at Pet 9-10), see also *Cohesive Techs Inc* v *Waters Corp*, 543 F 3d 1351, 1375 (Fed Cir 2008) (applying First Circuit law), *United States* v *Lentz*, 383 F 3d 191, 221-222 (4th Cir 2004), cert denied, 544 U S 979 (2005), *Solomon* v *United States*, 467 F 3d 928 935 (6th Cir 2006) (cited at Pet 10), *Mitchell* v *Maynard*, 80 F 3d 1433, 1450 (10th Cir 1996), cf *United States* v *Heubel*, 864 F 2d 1104, 1112 (3d Cir 1989) (applying three factors), *United States* v *White*, 846 F 2d 678, 696 (11th Cir) (same), cert denied, 488 U S 984 (1988), *United States* v *Wolff*, 127 F 3d 84, 88 89 (D C Cir 1997) (same), cert denied, 524 U S 929 (1998), *In re DaimlerChrysler Corp*, 294 F 3d 697, 700 701 (5th Cir 2002) (suggesting that the Third, Eleventh, and District of Columbia Circuits apply a "more lenient test' and declining to choose which test to adopt)

Petitioner cites that standard approvingly and he acknowledges that the Ninth Circuit engages in the same three-factor inquiry See Pet 9 12 (citing *United States* v *Wahrine*, 543 F 3d 546, 559-560 (2008), and *United States* v *Alondo Santos*, 385 F 3d 1199, 1201 (2004)) see also, *e g*, *United States* v *Ressam* 593 F 3d 1095, 1131-1132 (2010), *United States* v *Paul*, 561 F 3d 970, 975 (2009), *Rhoades* v *Avon Prods*, *Inc*, 504 F 3d 1151, 1165 (2007) Petitioner argues (Pet 12) however,

that in this case the court of appeals crafted a new test That is incorrect

In ordering reassignment on remand, the court of appeals cited, as an example, one of the many Ninth Circuit cases setting forth and applying the well-established standard Pet App 2 In *Rhoades*, 504 F 3d at 1165 (cited at Pet App 2), the court explained that remand to a different district judge is appropriate "if there is a demonstration of personal bias, or if "unusual circumstances" are deemed to exist after considering the three factors outlined above *Ibid* (quoting *United Nat'l Ins Co* v *R&D Latex Corp*, 141 F 3d 916, 920 (9th Cir 1998)) There is no reason to think that the court of appeals below "crafted a new and different standard' (Pet 12) at the same time it cited and relied on *Rhoades*

Nor does the court's explanation that it was reassigning the case because the trial judge 'may have difficulty putting his previously expressed views aside" signify a departure from the governing standard Pet App 2 The court cited the applicable case law and, in line with the approach of other courts, used shorthand when referencing the relevant standard See *e g*, *Research Corp Techs Inc* v *Microsoft Corp*, 536 F 3d 1247, 1255 (Fed Cir 2008) (reassigning case because judge's 'previously-expressed views or findings may make it difficult * * * to approach a remanded case with an open mind"), *Shcherbakovskiy* v *Da Capo Al Fine, Ltd.* 490 F 3d 130, 142 (2d Cir 2007) (reassigning case because it was "questionable" whether judge could be "objective') *Cullen* v *United States*, 194 F 3d 401 408 (2d Cir 1999) (noting that reassignment would be appropriate 'in recognition of the 'difficulty' that a judge might have 'putting aside his previously expressed views")

(quoting *United States* v *Campo*, 140 F 3d 415, 420 (2d Cir 1998)) At most, petitioner asserts an intracircuit conflict that would not warrant this Court's review See *Wisniewski* v *United States*, 353 U S 901, 902 (1957) (per curiam)

3 The court of appeals properly applied the well-established standard to the facts of this case and, in any event, any factbound error would not warrant this Court's review

The limited district court record reveals that the district judge granted petitioner's post-trial motion for a judgment of acquittal on the civil rights counts for reasons that were not raised by petitioner and to which the government had minimal opportunity to respond See Pet App 12-14 The judge repeatedly emphasized that the jury's guilty verdict could not stand because petitioner's conduct should never have been considered a federal offense According to the district court, the government had "at best [proved] an assault and battery which should have been prosecuted by the state court *Id* at 14-15, *id* at 14 (reiterating that this was "a simple assault and battery"), *id* at 13 (stating again, that it was "at best * * * a simple state assault and battery and should have been prosecuted by the state court as an assault and battery') But that reasoning was based on a clearly erroneous understanding of the law, as the court of appeals explained (*id* at 2) Given the judge's refusal to recognize that petitioner's conduct was in fact criminal under federal law, his failure to correctly apply the governing law, and his unwillingness to afford the government an adequate opportunity to respond to this newly raised basis for acquittal, reassignment on re-

mand was well within the court of appeals supervisory authority [4]

The grounds for reassignment in this case are similar to those relied on by the court of appeals in *Rhoades* (cited at Pet App 2) The *Rhoades* court determined that reassignment was warranted because the district judge granted a motion to dismiss without affording the other side an opportunity to respond, and based on a belief that the case was 'brought for an improper motive," of which there was no record evidence, and on an erroneous understanding of the law 504 F 3d at 1165 1166 (citation omitted), see also *Shcherbakovskiy* 490 F 3d at 142 (reassignment following reversal of dismissal order and entry of default judgment even though there was ' little doubt that the district judge would follow [the court's] instructions as to the law on remand') *United States* v *Andrews*, 390 F 3d 840, 851 (5th Cir 2004) (reassignment because judge ' breached the barrier between the rule of law and exercise of personal caprice"), *Mitchell* 80 F 3d at 1448-1450 (reassignment following reversal of entry of judgment as a matter of law where, *inter alia*, judge previously expressed views that the plaintiff's ' Eighth Amendment claims are frivolous, a waste of the jury's time and as a matter of law fail to state a claim') *Hermes Automation Tech , Inc* v *Hyundai Elecs Indus Co* , 915 F 2d 739, 752 (1st Cir 1990) (reassignment following reversal of dismissal or

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[4] Petitioner also relies on Federal Rule of Criminal Procedure 25(b) to argue that reassignment is never proper unless the trial judge is unable to perform his duties 'because of absence death sickness or other disability ' Pet 13-15 (quoting Fed R Crim P 25(b)) But petitioner concedes that an inability to put aside previously expressed views would qualify as an other disability (Pet 14) which is what the court of appeals found

der where judge had "strong criticism of plaintiffs' claims as not only frivolous, but verging on fraudulent," even though court had "no doubt that the original district judge could handle plaintiffs' claims with unquestionable fairness"), *United States* v *Torkington*, 874 F 2d 1441, 1446 1147 (11th Cir 1989) (reassignment following reversal of entry of judgment of acquittal where, among other things, the judge "questioned the wisdom of the substantive law" and challenged the government's decision to prosecute")

Any asserted factbound error in the court s exercise of its supervisory powers does not warrant this Court s review

CONCLUSION

The petition for a writ of certiorari should be denied

Respectfully submitted

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